MOHD. DALHAR BIN REDZWAN & ANOR.

v.

DATUK BANDAR, DEWAN BANDARAYA KUALA LUMPUR

COURT OF APPEAL, KUALA LUMPUR
DATUK HAJI SHAIK DAUD JCA
TUAN GOPAL SRI RAM JCA
DATO' V.C. GEORGE JCA
[CIVIL APPEAL NO. W-07-21-94]
27 FEBRUARY 1995

***JURISDICTION** : Application under s. 66(1) Courts of Judicature Act 1964 to refer certain questions to Court - Whether threshold requirements of s. 66(1) present - Applicant applying to High Court for revision of Magistrate's decision - High Court Judge calling for records of lower Court but declining to exercise power of revision - Whether the act of calling for and going through the records was an exercise of power - Whether applicant has a right to apply under s. 66(1) of the Courts of Judicature Act 1966 to refer questions to the Court - Whether appellate Court has jurisdiction to entertain the application.*

***JURISDICTION** : Application under s. 66(1) Courts of Judicature Act 1964 to refer certain questions to Court - Whether there had been any question of law of public interest which arose for the consideration of the High Court Judge - Whether the determination of such question had affected the learned Judge's decision not to interfere with the course taken by the learned Magistrate.*

The second applicant was charged in the Magistrate's Court for an offence in contravention of bye-law 2 of the Licensing of Trades, Businesses and Industries (Federal Territory of Kuala Lumpur) Bye-laws 1986, a bye-law of the Local Government Act 1976. The first applicant, as the general manager of the second applicant, appeared before the Magistrate on behalf of the latter, pleaded guilty to the charge and was fined RM500. The magistrate also imposed a penalty of RM100 per day for as long as the offence continued.

The second applicant elected not to appeal against the sentence imposed, but instead wrote to the High Court asking for the orders of the Magistrate to be revised.

The learned Judge of the High Court called for the record of the Magistrates' Court to satisfy himself as to the legality and correctness of the orders made, and upon being satisfied that the learned Magistrate had acted correctly in making the impugned orders, declined to revise the orders in question.

The question that arose was whether, in such circumstances, the appellate Court had the jurisdiction to entertain the application to refer questions to the Court under s. 66(1) of the Court of Judicature Act 1964 (the Act).

Held:

Per Gopal Sri Ram JCA (Haji Shaik Daud JCA, concurring):

[1] The issue raised must *ex necessitae rei* be answered by reference to the following principles which are well settled and beyond doubt. Firstly, under s.305 of the Criminal Procedure Code (CPC), a person who has been convicted on his plea of guilt is entitled to appeal only against the extent or legality of the sentence. However, a Court hearing an appeal against sentence is entitled to and will, where appropriate, act in revision and set aside a conviction.

[2] Secondly, save in exceptional cases and for very good reasons, there can be no resort had by a party to the revisionary jurisdiction of the High Court when the decision complained of is appealable and no appeal has been lodged. Thirdly, in order for the Court to entertain an application under s. 66 of the Act, the question in respect of which leave is sought must have arisen before the High Court and its determination must have affected the event of the appeal or revision.

[3] The answer to the problem posed lies in giving effect to the plain words of s. 66(1) and (5) of the Act. It is an established principle of statutory interpretation that in the absence of any ambiguity, a strict and literal construction should be applied to the language by which Parliament has expressed its collective intention. In the circumstances, and applying the principles culled from the authorities, the Court is driven to the conclusion that the expression "the exercise of any power of revision" appearing in s. 66 (5)(b) of the Act encompasses not only the calling for the record of a case but also the making of an order.

[4] The power to act in revision conferred by Chapter XXXI of the Criminal Procedure Code must be read with the additional and somewhat wider power reflected in s. 35(1). When read in its proper context, revision is the act of calling for the record of a subordinate Court **and** the making of one or more orders in respect thereof. Where the High Court calls for the record but having examined it decides to take the matter no further, there is no revision. Put shortly, there must be a positive act of revision, being more than the mere act of calling for the records.

[5] In the circumstances, as there were no proceedings before the High Court and as the question sought to be posed did not arise in the High Court, the threshold requirements of s. 66(1) of the Act are absent and the Court therefore has no jurisdiction to entertain the application.

Obiter dicta:

The proper respondent to all criminal proceedings before the High Court and this Court is the Public Prosecutor and not the particular complainant in criminal proceedings commenced by the issue of a summons. This is for the reason that it is the Public Prosecutor who has the sole control over all criminal proceedings of whatever name and by whomsoever commenced.

Per V.C. George JCA, dissenting:

[1] It is obvious that for s. 66(1) of the Act (read with s. 66(5)(b) thereof) to be invoked *vis-a-vis* the exercise of the power of revision of the High Court under s. 323 of the CPC, there has to have been an exercise of some power of revision and there has to have been a question or questions of law of public interest that arose in the course of the exercise of such power of revision, the determination of which by the High Court had affected the exercise of the revisionary powers.

[2] Section 323 of the CPC provides powers to the Judge of the High Court the exercise of which powers is the calling for and examining the records of inferior Courts for the purposes set out in that section. Sections 324 & 325 deal with the powers given to the Judge to be exercised after he has exercised the powers given by s. 323. This is brought home in respect of s. 324 by the provision that the power to order further inquiry is to be exercised "after examining any record..." and by the heading to s. 325: "Powers of Judge on revision".

[3] "On Revision", in the context, has reference to the exercise by the Judge of the powers given to him by s. 323 and having done so, the directing of his mind as to whether he should

or should not exercise the powers given to him by either s. 324 or s. 325. In the instant case it is clear that the learned Judge had exercised that part of the powers "of revision" given by s. 323 but he had declined "on revision" to exercise the powers under either s. 324 or s. 325.

[4] As the learned Judge had exercised his powers under s. 323 such exercise is by the terms of s. 66(5)(b) of the Act deemed to be an appeal from the decision of the subordinate Court in question and accordingly may properly be the subject of an application for granting of leave to have the matter taken up in the Court of Appeal, provided that there is a question of law of public interest which had arisen in the course of the exercise of the powers of the Court under s. 323 the determination of which by the Judge had affected his decision not to exercise the powers allotted to him under ss. 324 or 325.

[5] The effect of the suggestion, that s. 66(1) of the Act may not be properly invoked in respect of the exercise of the powers given by s. 323 of the CPC unless the Judge concerned had gone on to exercise powers given to him by s. 324 and/or s. 325, is that the party aggrieved by the Judge not interfering with the Magistrate's decision or order although invited to do so and even if there has been a blatant miscarriage of justice may not seek to take the matter further whereas the party on the other side may do so if the Judge had interfered. In respect of parties to a matter that has been looked into by a Judge pursuant to his powers under s. 323 of the CPC, there should be equality of consequences and particularly as s. 66(1) of the Act (read with s. 66(5)(b))lends itself to be so read with such equality of consequences, it should be so read.

[6] The phrase "when exercising his powers of revision" appearing in s. 326 of the CPC clearly has reference to the Judge deliberating on what order (if any) he should make as he, pursuant to the powers given to him by s. 323, examines the Magistrate's record of the proceedings and is not limited to his making the orders he is permitted to make either pursuant to s. 324 or s. 325. This is another compelling reason for holding that the invocation of the Judge of s. 323 amounts to an exercise by the High Court of a power of revision even though he chooses not to interfere with the Magistrate's decision or order.

[7] Clearly there were at least two questions of public interest which were before the Judge when he chose to invoke s. 323 and called for and examined the proceedings in the Magistrates' Court that is to say;

(i) whether the first applicant's plea of guilt should have been accepted; and

(ii) whether the first applicant should have been convicted and in any event whether he should have been fined, as he claims to have been.

[8] There can be no doubt that the determination of each of those questions by the learned Judge must have been in the affirmative and must have affected the event of the learned Judge refusing to interfere with the learned Magistrate accepting the plea of guilt and making the orders that he had made.

[9] While it is true that a person who pleads guilty may take up the issue of nullity on an appeal against sentence, that is a round about way of trying to rectify the error made. The revisionary powers provided by s. 323 are designed for just the kind of situation that the first applicant found himself to be in and is the more appropriate procedure to be invoked where a person who is not charged is subjected to a penalty.

[10] The applicant is entitled to the leave he seeks. Going by what the first applicant states in his affidavit (and the respondent has not taken issue with what he states), the conviction

and the orders made thereto are clearly nullities. An order made in the criminal jurisdiction of the Magistrates' Court which is a nullity and unjust, to boot, should not be allowed to stand.

[11] That being so, this Court should forthwith set aside the conviction and the sentence passed whether it was against the first or second applicant and direct that the fine be refunded to the first applicant with the further direction that the Magistrate fix a fresh date for the return of the summons when he could ensure that some person entitled to properly appear on behalf of the second applicant appears before the Court.

Obiter dicta:

Until the law is amended, a plea from a corporation in respect of a charge against it should be taken from a representative of the corporation duly authorised by a statement in writing to do so signed by the managing director of the corporation or by the person having the management of the affairs of the corporation and in the absence of the same, a plea of not guilty be entered and the trial proceeded with.

[Application to refer questions under s. 66(1) of the Courts of Judicature Act 1964 dismissed].

[**Bahasa Malaysia** Translation of Headnote]

BIDANGKUASA : *Permohonan di bawah s. 66(1) Akta Mahkamah Kehakiman 1964 untuk merujuk soalan-soalan tertentu kepada Mahkamah - Sama ada takat keperluan 2.66(1) tercapai - Pemohon memohon kepada Mahkamah Tinggi untuk penyemakan keputusan Majistret - Hakim Mahkamah Tinggi meminta rekod-rekod Mahkamah rendah tetapi enggan melaksanakan kuasa-kuasa penyemakan - Sama ada pemohon mempunyai hak untuk memohon di bawah s. 66(l) Akta Mahkamah-Mahkamah Kehakiman 1966 untuk merujukkan soalan-soalan kepada Mahkamah - Sama ada Mahkamah Rayuan mempunyai bidangkuasa untuk melayani permohonan tersebut.*

BIDANGKUASA : *Permohonan di bawah s. 66(1) Akta Mahkamah-Mahkamah Kehakiman 1964 untuk merujuk beberapa soalan kepada Mahkamah - Sama ada terdapatnya persoalan undang-undang mengenai kepentingan awam yang terbit bagi pertimbangan Mahkamah Tinggi - Sama ada penentuan persoalan yang sedemikian telah menjejaskan keputusan Hakim yang bijaksana untuk tidak mencampuri dalam laluan yang telah diambil oleh Majistret yang bijaksana.*

Pemohon kedua telah didakwa dalam Mahkamah Majistret atas kesalahan melanggari undang-undang kecil 2 Perlesenan Perdagangan, Perniagaan dan Industri (Wilayah Persekutuan Kuala Lumpur) Undang-Undang Kecil 1986, satu undang-undang kecil Akta Kerajaan Tempatan, 1976. Pemohon pertama yang merupakan pengurus besar pemohon kedua, telah hadir di hadapan Majistret bagi pihak yang terkemudian telah mengaku bersalah dan didenda sebanyak RM500. Majistret tersebut telah juga mengenakan penalti sebanyak RM100 sehari sepanjang kesalahan itu berterusan.

Pemohon kedua memilih untuk tidak merayu terhadap hukuman yang dikenakan, tetapi sebaliknya telah menulis kepada Mahkamah Tinggi meminta supaya perintah-perintah Majistret disemak..

Tuan Hakim Mahkamah Tinggi yang bijaksana telah meminta rekod Mahkamah Majistret bagi memuaskan dirinya mengenai ketepatan dan keesahan perintah-perintah yang telah dibuat, dan setelah berpuashati bahawa Majistret yang bijaksana itu telah bertindak dengan betul

dalam membuat perintah-perintah yang dicabar itu, enggan untuk menyemak perintah-perintah yang dipersoalkan itu.

Persoalan yang timbul adalah sama ada, dalam keadaan yang sedemikian, Mahkamah Rayuan mempunyai bidangkuasa untuk melayan permohonan bagi merujuk soalan-soalan kepada Mahkamah di bawah s. 66(1) Akta Mahkamah Kehakiman 1964 (Akta tersebut)

Diputuskan:

Per: Gopal Sri Ram HMR (Hj. Shaik Daud, HMR bersetuju):

[1] Isu yang ditimbulkan mestilah secara *ex necessitae rei* dijawap dengan rujukan kepada prinsip-prinsip berikut yang mana telah diselesaikan dengan baik dan tanpa diragui. Pertamanya, di bawah s. 305 Kanun Prosedur Jenayah (CPC), seseorang yang telah disabitkan atas akuan bersalahnya adalah berhak kepada rayuan hanya terhadap had atau keesahan hukuman tersebut. Walaubagaimanapun, Mahkamah yang mendengar rayuan terhadap hukuman adalah berhak dan akan, di mana wajar, bertindak dalam semakan dan mengenepikan sesuatu sabitan.

[2] Keduanya, melainkan dalam kes-kes yang terkecuali dan atas sebab-sebab yang amat wajar, tidak mungkin terdapat sesuatu cara yang diperolehi oleh sesuatu pihak kepada bidangkuasa penyemakan Mahkamah Tinggi di mana keputusan yang diadukan boleh dirayui dan tidak terdapat rayuan yang telah dibuat. Ketiganya, agar Mahkamah dapat melayan sesuatu permohonan di bawah s. 66 Akta tersebut, persoalan berhubung yang mana kebenaran dipohon, tentunya telah terbit dihadapan Mahkamah Tinggi dan penentuannya pasti telah menjejaskan kejadian rayuan atau semakan tersebut.

[3] Jawapan kepada masaalah yang diutarakan terletak kepada menguatkuasakan perkataan-perkataan jeles s. 66(l) dan (5) Akta tersebut. Ianya adalah prinsip pentafsiran berkanun yang kukuh bahawa dalam ketiadaan apa-apa ketaksaan pembentukan harafiah dan yang tegas seharusnya dipakai pada bahasa melalui yang mana Parlimen telah menyatakan niat kolektifnya. Dalam keadaan yang sedemikian, dan memakai prinsip yang dipetik dari autoriti-autoriti tersebut, Mahkamah terpaksa membuat keputusan bahawa ungkapan "the exercise of any power of revision" ("perlaksanaan mana-mana kuasa penyemakan") yang terdapat dalam s. 66(5) (b) Akta tersebut melingkungi bukan sahaja permintaan untuk mendapatkan rekod sesuatu kes tetapi juga pembuatan sesuatu perintah.

[4] Kuasa untuk bertindak dalam penyemakan yang diberikan oleh Bab XXXI Kanun Prosedur Jenayah mestilah dibaca dengan kuasa yang agak lebih luas dan tambahan padanya yang dibayangkan dalam s. 33(l). Apabila dibaca dalam konteksnya yang betul, penyemakan adalah perbuatan meminta rekod Mahkamah rendah dan pembuatan satu atau pun lebih perintah-perintah berhubung dengannya. Di mana Mahkamah Tinggi meminta rekod-rekod tersebut tetapi setelah menyemaknya membuat keputusan untuk tidak meneruskan perkara tersebut, maka tidak akan terdapat penyemakan. Secara ringkasnya dikatakan, adalah harus terdapatnya satu tindakan positif penyemakan, kerana ianya merupakan lebih daripada tindakan meminta rekod-rekod semata-mata.

[5] Dalam keadaan tersebut, oleh kerana tidak terdapat prosiding di hadapan Mahkamah Tinggi dan oleh kerana persoalan yang dipohon untuk diutarakan tidak timbul dalam Mahkamah Tinggi, had keputusan s. 66(i) Akta tersebut ketiadaan dan Mahkamah dengan itu tidak mempunyai bidangkuasa untuk melayan permohonan tersebut.

Obiter dicta:

Responden yang wajar kepada semua prosiding jenayah di hadapan Mahkamah Tinggi dan Mahkamah ini adalah Pendakwa Raya dan bukannya pengadu yang tertentu dalam prosiding-prosiding jenayah yang dimulakan dengan pengeluaran satu saman. Ini adalah kerana Pendakwa Raya yang mempunyai kawalan tunggal ke atas semua prosiding-prosiding jenayah yang mempunyai apa jua nama dan telah dimulakan oleh sesiapa pun.

Per: V.C. George, HMR menentang:

[1] Ianya jelas bahawa untuk s. 66(l) Akta tersebut (dibaca bersama dengan s. 66(5) (b)) digunakan berhubung dengan perlaksanaan kuasa penyemakan Mahkamah Tinggi di bawah s. 323 Kanun Prosedur Jenayah, seharusnya telah terdapat perlaksaan sebahagian kuasa penyemakan dan tentunya telah terdapat persoalan undang-undang yang mempunyai kepentingan awam yang telah timbul dalam perjalanan perlaksanaan kuasa penyemakan yang sedemikian, penentuan yang mana oleh Mahkamah Tinggi telah menjejaskan perlaksanaan kuasa-kuasa penyemakan tersebut.

[2] Seksyen 323 Kanun Prosedur Jenayah memperuntukkan kuasa-kuasa kepada Hakim Mahkamah Tinggi, perlaksanaan kuasa-kuasa yang mana adalah untuk meminta dan memeriksa rekod-rekod Mahkamah-Mahkamah rendah bagi tujuan-tujuan yang dibentangkan dalam seksyen tersebut. Seksyen-seksyen 324 & 325 berurusan dengan kuasa-kuasa yang telah diberikan kepada Hakim untuk dilaksanakan selepas beliau, melaksanakan kuasa-kuasa yang telah diberikan di bawah s. 323. Ini telah disimpulkan berhubung dengan s. 324 oleh peruntukan bahawa kuasa untuk memerintahkan penyiasatan yang selanjutnya hendaklah dilaksanakan “selepas memeriksa mana-mana rekod” dan oleh tajuk kepada s. 325 "Kuasa-Kuasa Hakim dalam penyemakan”.

[3] “On Revision” (Berhubung dengan penyemakan) dalam konteks tersebut, mempunyai rujukan kepada perlaksanaan oleh Hakim terhadap kuasa-kuasa yang diberikan kepadanya oleh s. 323 dan setelah melakukannya, menumpukan pemikirannya sama ada beliau seharusnya atau tidak seharusnya melaksanakan kuasa-kuasa yang diberikan kepadanya sama ada oleh s. 324 atau s. 325. Dalam kes semasa ini, adalah jelas bahawa Tuan Hakim yang bijaksana telah melaksanakan kuasa-kuasa tersebut bagi penyemakan yang telah diberikan oleh s. 323 tetapi beliau telah menolak “pada penyemakan” untuk melaksanakan kuasa-kuasa tersebut di bawah sama ada s. 324 atau s. 325.

[4] Oleh kerana Tuan Hakim yang bijaksana telah melaksanakan kuasa-kuasanya di bawah s. 323 perlaksanaan yang sedemikian adalah menurut terma-terma s. 66(5)(b) Akta tersebut dianggap sebagai rayuan daripada keputusan Mahkamah rendah yang dipersoalkan dan sehubungan itu boleh dengan wajarnya menjadi hal-perkara sesuatu permohonan bagi mendapatkan kebenaran supaya perkara tersebut diterima dalam Mahkamah Rayuan, jikalau terdapatnya persoalan undang-undang yang mempunyai kepentingan awam yang telah timbul dalam perjalanan perlaksanaan kuasa-kuasa Mahkamah tersebut di bawah s. 323 dimana penentuannya oleh Hakim telah menjejaskan keputusannya untuk tidak melaksanakan kuasa-kuasa yang diuntukkan padanya di bawah ss. 324 atau 325.

[5] Kesan saranan, bahawa s. 66(l) Akta tersebut mungkin tidak dapat digunakan dengan betul berkaitan dengan perlaksanaan kuasa-kuasa yang diberikan oleh s. 323 Kanun Prosedur Jenayah kecuali Hakim yang berkenaan telah melaksanakan kuasa-kuasa yang telah diberikan kepadanya oleh s. 324 dan/atau s. 325 adalah bahawa pihak yang terkilan kerana Tuan Hakim tidak mencampuri keputusan atau perintah Majistret walaupun dijemput supaya melakukannya dan sungguhpun terdapat satu salah nyata keadilan yang terang, tidak dapat mengemukakan

perkara tersebut selanjutnya sedangkan pihak yang berada di bahagian yang lain mungkin akan melakukan sedemikian jika Tuan Hakim telah mencampuri. Berhubung dengan pihak-pihak kepada kepada sesuatu perkara yang telah diputuskan oleh Tuan Hakim selaras dengan kuasa-kuasanya di bawah s. 323 Kanun Prosedur Jenayah, memandangkan s. 66(1) Akta tersebut (dibaca bersama s. 66(5)(b)), membenarkan ianya dibaca sedemikian dengan persamaan keadaan yang sedemikian, ianya dengan itu haruslah dibaca sedemikian.

[6] Ungkapan "when exercising his powers of revision" (bilamana melaksanakan kuasa-kuasa penyemakannya) yang terdapat dalam s. 326 Kanun Prosedur Jenayah dengan jelasnya mempunyai rujukan kepada Tuan Hakim memutuskan atas apakah perintah (jika ada) yang beliau seharusnya buat bila beliau, selaras dengan kuasa yang diberikan kepadanya oleh s. 323, memeriksa rekod Majistret berhubung dengan prosiding-prosiding dan tidak terhad kepada membuat perintah yang beliau telah dibenarkan untuk membuat sama ada selaras dengan s. 324 atau s. .325. Ini adalah satu lagi alasan bagi memutuskan bahawa penggunaan kuasa di bawah s. 323 Tuan Hakim bagi membawa kepada pelaksanaan kuasa penyemakan oleh Mahkamah Tinggi walaupun beliau memilih untuk tidak mencampuri dengan keputusan atau perintah Majistret.

[7] Dengan jelasnya terdapat sekurang-kurangnya dua persoalan kepentingan awam, yang mana terdapat di hadapan Tuan Hakim bila beliau memilih untuk menggunakan s. 323 dan mempersoalkan serta menyemak prosiding-prosiding tersebut di Mahkamah Majistret iaitu;

(i) Sama ada akuan bersalah plaintif pertama seharusnya diterima; dan

(ii) sama ada pemohon pertama seharusnya telah disabitkan dan dalam apa keadaan pun sama ada ianya harus didenda, sepertimana yang beliau mengatakan telah dilakukan.

[8] Tidak boleh diragukan lagi bahawa penentuan setiap satu persoalan itu oleh Tuan Hakim yang bijaksana tentunya dalam bentuk membenarkan dan tentunya telah menjejaskan peristiwa Tuan Hakim enggan untuk mencampuri penerimaan oleh Majistret yang bijaksana kepada akuan bersalah dan membuat perintah-perintah yang telah pun beliau buat.

[9] Sementara ianya benar bahawa seseorang yang mengaku bersalah boleh mengemukakan isu nullity atas rayuan terhadap hukuman, ini adalah cara yang lebih rumit bagi memperbetulkan kesilapan yang telah dibuat. Kuasa-kuasa penyemakan yang diberikan oleh s. 323 adalah direka untuk situasi dalam mana pemohon pertama tersebut berada dan adalah prosedur yang lebih wajar untuk digunakan di mana seseorang yang tidak didakwa adalah tertakluk kepada satu penalti.

[10] Pemohon berhak kepada kebenaran yang beliau pohon. Memandangkan apa yang dikatakan oleh pemohon pertama dalam afidavitnya, (dan responden tidak mngambil isu dengan apa yang telah dinyatakannya), sabitan dan perintah-perintah yang dibuat adalah dengan jelasnya merupakan nullities. Sesuatu perintah yang dibuat dalam bidangkuasa jenayah Mahkamah Majistret yang mana adalah satu nullity dan tidak adil, tidak seharusnya dibenarkan.

[11] Justeru itu, Mahkamah ini seharusnya segera mengenepikan sabitan dan hukuman yang dijatuhkan sama ada ianya terhadap pemohon pertama atau kedua dan mengarahkan supaya denda tersebut dikembalikan kepada pemhon pertama dengan arahan yang selanjutnya bahawa Majistret menetapkan tarikh yang baru bagi pemulangan saman tersebut bilamana beliau dapat memastikan bahawa orang yang berhak untuk hadir dengan betulnya bagi pihak pemohon kedua hadir di hadapan Mahkamah.

Obiter dicta:

Sehingga undang-undang tersebut dipinda, sesuatu pengakuan daripada sesebuah perbadanan berhubung dengan satu tuduhan terhadapnya seharusnya diterima daripada seorang wakil perbadanan tersebut yang telah diberikuasa oleh satu pernyataan bertulis untuk melakukannya yang telah ditandatangani oleh pengarah urusan perbadanan tersebut atau oleh orang yang menguruskan hal-ehwal perbadanan tersebut dan dalam ketiadaannya, satu pengakuan tidak bersalah hendaklah dimasukkan dan perbicaraan tersebut diteruskan.

[Permohonan untuk merujuk persoalan-persoalan di bawah s. 66(l) Akta Mahkamah Kehakiman 1964 ditolak].

Cases referred to:

Low Hiong Boon v. P.P. [1948-49] MLJ Supp. 135 ***(refd)***
Tang Kee Chie v. P.P. [1987] 430 ***(refd)***
Ho Kin Luan v. P.P. [1959] MLJ 159, at 161 ***(refd)***
Manokaran v. P.P. [1979] 1 MLJ 262 ***(refd)***
Dorai Manickam v. R [1936] MLJ 261 ***(refd)***
Padfield v. Minister of Agriculture [1968] AC 997 ***(dist)***
Liaw Kwai Wah v. P.P. [1987] 2 MLJ 69 ***(refd)***
*Tan Yin Yen v. P.P. [1973] 2 MLJ 143****(refd)***
Nunis v. P.P. [1982] 2 MLJ 114 ***(refd)***
Malayan Banking v. International Tin Council [1989] 3 MLJ 286 ***(refd)***
Salaman v. Warner [1891] 1 KB 734 CA ***(refd)***
Bozson v. Altrincham UDC [1903] 1 KB 546 @ 548 ***(refd)***
Ratnam v. Cumarasamy [1962] 28 MLJ 330 ***(refd)***
Salter Rex & Co. v. Ghosh [1971] 2 QB 597 ***(refd)***
Haron bin Mohd. Zaid v. Central Securities (Holdings) Bhd. [1983] 1 AC 16; [1982] MLJ 94 ***(refd)***
Justin Milroy Narakera v. P.P. [1990] 2 CLJ 226 ***(refd)***

Legislation referred to:

Courts of Judicature Act, 1964, ss. 66(1), s. 66(5)(b)), 305
Criminal Procedure Code, ss. 66(1) (5), 305, 307(1),
Licensing of Trades, Businesses and Industries (Federal Territory of Kuala Lumpur) Bye-laws 1986, Local Government Act 1976.
Supreme Court Act 1981, s. 18(2)(a) (UK)
Criminal Justice Act of 1925, s. 33 (UK)
EPF Act, s. 16A(4)
Colony CPC I, 283(l)(b)(4), s. 56(4)

For the applicants - Su Tiang Joo (Jayne Koe with him); M/s. Cheah Teh & Su
For the public prosecutor - Junaidah bte Abdul Rahman, DPP

JUDGMENT

Gopal Sri Ram JCA:

This Court was moved on 6 February 1995, by the applicants for leave to refer certain questions to this Court under s. 66(1) of the Courts of Judicature Act, 1964, which I will refer to as the Act throughout this judgment. Having heard argument, we reserved judgment. I now hand down the conclusions I have arrived at and the reasons for them.

Although there is a reference in the motion to s. 66(5) (b) of the Act, the first prayer asks for an order in the following terms:

> a) Pemohon-pemohon diberi kebenaran untuk merayu kepada Mahkamah Rayuan Malaysia terhadap keputusan Yang Arif Dato' Syed Ahmad Idid bin Syed Abdullah Idid yang diberi

pada 20 Oktober 1994 yang memutuskan bahawa berdasarkan kepada peruntukan dibawah s. 323 Kanun Acara Jenayah, Yang Arif Hakim tidak perlu menggunakan kuasa penyemakan Yang Arif untuk menyemak kes ini.

Now that seemed quite odd because what was being sought was leave to appeal and not leave to reserve questions. But Encik Su in the course of his address to us conceeded that the motion was unhappily worded and that what he really wanted was, leave to reserve the questions set out in paragraph 9 of the supporting affidavit.

For my part I would readily express my gratitude to Counsel and parties who do not not formulate their applications in cryptic language and await an oral hearing to explain what they really want. The consequence of drafting motions in unclear terms tends to mislead the Court and does little or nothing to advance the course of justice which is the ultimate master we all serve. Practitioners and Deputy Public Prosecutors should note that where an application is made under s. 66, the motion must be intituled in the matter of that section. Further, the questions of law in respect of which leave is sought must appear in the body of the motion and not merely in the supporting affidavit as has been done in this case.

Having said this, I return to the present application. In paragraph 9 of the supporting affidavit are identified several questions of law which according to Counsel merit a reference. Of these, only one really has survived in argument and that too in an amended form. It reads as follows:

Whether a party who has applied for revision and has been refused it has a right to apply under s. 66(1) of the Courts of Judicature Act, 1966.

To understand the question it is necessary to advert to the salient facts of the case.

On 25 July 1994, the Datuk Bandar of Kuala Lumpur caused to be issued out of the Magistrates' Court a summons to the second applicant to attend before that Court to answer a charge in the following terms:

Bahawasanya kamu pada 19 Mei 1994 lebih kurang pukul 11.00 pagi didapati ada menggunakan premis No. Lot 5.3 No. 29, Jalan Pahang Kuala Lumpur sebagai tempat untuk menjalankan perniagaan menjual kereta terpakai tanpa lesen daripada Datuk Bandar Kuala Lumpur maka dengan itu kamu telah melanggar s. 2 Undang-Undang Kecil Perlesenan Tred, Perniagaan dan Perindustrian (Wilayah Persekutuan Kuala Lumpur) 1986 adalah satu kesalahan boleh dihukum dibawah s. 27 Undang-Undang Kecil tersebut.

On 28 September 1994, the first applicant, who is the general manager of the second applicant, appeared before the Magistrate on behalf of the latter. He pleaded guilty to the charge and was fined RM500 which he paid. He was also ordered to pay a penalty of RM100 per day for as long as the offence continued. That sum the applicants have refused to pay. The second applicant could have appealed against the sentence imposed under s. 305 of the Criminal Procedure Code ("the Code") within the time prescribed by s. 307(1). But it elected not to do so. Instead, the applicants instructed solicitors to write to the High Court asking for the orders of the Magistrate to be revised. This the solicitors did by a letter dated 15 October 1994. The principal complaints disclosed in their letter pertain to two matters, both of which were also mentioned to us in the course of argument. The first relates to the validity of the by-laws for the breach of which the charge in question was preferred. The second relates to the plea of guilt by the first applicant whom, it is contended, is not a director of the second applicant. The argument here is that even if the second applicant was guilty of an offence, it is the directors of that applicant who may be punished vicariously and not some inconsequential subordinate, such as the first applicant.

On 20 October 1994, the Deputy Registrar of the Criminal Division responded to the solicitors' letter. Shorn of its formalities, this is how it reads:

> Dengan hormatnya saya merujuk kepada perkara di atas dan surat tuan bertarikh 14 Oktober 1994 yang kami terima pada 18 Oktober 1994. Adalah saya diarahkan untuk memberitahu tuan bahawa pada masa hadapan surat tuan hendaklah dialamatkan kepada Timbalan Pendaftar dan bukan terus kepada Y.A. Hakim.
>
> 2. Surat tuan telah dirujuk kepada Y.A. Hakim dan Y.A. telah mengkaji isu-isu yang telah ditimbulkan. Daripada apa yang ketara daripada rekod dan soalan yang dibangkitkan, jelas juga bahawa jawapannya ada di bawah rang undang-undang dan kes-kes autoriti. Berdasarkan kepada peruntukan di bawah s. 323 Kanun Acara Jenayah, **Y.A. telah memutuskan bahawa beliau tidak perlu menggunakan kuasa penyemakan beliau untuk menyemak kes ini**. (The emphasis is mine).

From the contents of the letter two matters are obvious. In the first place, the learned Judge to whom the applicants' solicitors' letter was referred called for the record of the Magistrates' Court to satisfy himself as to the legality and correctness of the orders made. Secondly, it is clear that the learned Judge was satisfied that the learned Magistrate had acted correctly in making the impugned orders and for that reason declined to revise the orders question.

The question that we have to deal with is whether in such circumstances this Court has jurisdiction to entertain an application under s. 66(1) of the Act. Encik Su argues in support of an affirmative answer. The learned Deputy who appeared for the respondent had suprisingly indicated to Encik Su that she had no objections to the application. However, after hearing the exchange between Counsel and members of the Court she obviously realised the error into which she had fallen, and, therefore, decided to oppose the application. In my judgment, the issue raised by Encik Su must *ex necessitae rei* be answered by reference to the following principles which are well settled and beyond doubt.

I begin by recognising that under s. 305 of the Code, a person who has been convicted on his plea of guilt is entitled to appeal only against the extent or legality of the sentence. However, once such an appeal has been lodged, there is nothing to prevent an appellant from contending at the hearing that the conviction is illegal and requesting the Judge hearing the case to act in revision. Of course the appellant in such a case ought, wherever possible, to give the Court and the Public Prosecutor adequate notice of this, setting out the grounds on which the revision will be sought. A Court hearing an appeal against sentence is entitled to and will where appropriate, act in revision and set aside a conviction. The Malayan Law Journal is replete with pronouncements that support this proposition and I need only mention the decisions in *Low Hiong Boon v. P.P.* [1948-49] MLJ Supp. 135 and *Tang Kee Chie v. P.P.* [1987] 430 as illustrations of the principle. Reference may also be usefully had to the remarks of Thomson CJ in *Ho Kin Luan v. P.P.* [1959] MLJ 159, at 161.

In *Tang Kee Chie (supra)*, Chong Siew Fai J (now FCJ) stated the principle in the following words:

> Learned Counsel for the prosecution, obviously with s. 305 of the Criminal Procedure Code and/or s. 50(2) of the Courts of Judicature Act, 1964 in mind, submitted that since the appellant had pleaded guilty and was convicted on such plea, there could be no appeal against conviction. I need only refer to the following cases to illustrate that convictions were set aside where the accused persons were convicted on their own plea of guilty. *Heng Kim Khoon v. Public Prosecutor, Subramaniam & Anor. v. Public Prosecutor.* If the facts disclosed in a case show the absence of an essential ingredient constituting the alleged offence such that no Court would

have convicted the accused, the conviction and sentence will be set aside. Even if there is no right of appeal, this Court as **the appellate Court is entitled to look into the record and exercise its power of revision if the record shows that a failure of justice had occasioned**. (Emphasis supplied).

In *Manokaran v. P.P.* [1979] 1 MLJ 262 Abdoolcader J. (as he then was) dealt with the revisionary power in the following way:

I have however not only extensive powers of revision in criminal proceedings under the provisions of s. 325 of the Criminal Procedure Code but even wider powers conferred by s. 35 of the Courts of Judicature Act, 1964, and the Deputy Public Prosecutor agrees that in a case like this where there is an appeal against conviction on a plea of guilty it is open to me to deal with the conviction in the exercise of my powers of revision if the circumstances of the case so warrant. **I would merely add that in my view notwithstanding the provisions of s. 305 of the Criminal Procedure Code an appeal against a conviction on a plea of guilty will still lie if the charge discloses no offence in law, in which event the conviction itself would be illegal and a nullity.**

It is true that the matters complained of in this appeal have been brought to my notice by way of a record of appeal and the proceedings before me are headed in the criminal appeal, but, as I pointed out to, Counsel on both sides of the outset of this hearing, it is nevertheless open to me notwithstanding this to exercise my powers of revision in this matter, and I referred in this regard to the decision of the Privy Council in *In re Chunbidya & Ors.* to the effect that **when the High Court has before it on appeal a record of criminal proceedings, it can proceed to exercise its powers of revision if it chooses to do so and make the requisite order** although precluded by another provision in the Criminal Procedure Code from doing so in the appeal. (Emphasis added).

The second principle of settled law is that, save in exceptional cases and for very good reasons, there can be no resort had by a party to the revisionary jurisdiction of the High Court when the decision complained of is appealable and no appeal has been lodged: *Dorai Manickam v. R* [1936] MLJ 261.

The third proposition which I think is self-evident is that, quite apart from all other considerations, in order for this Court to entertain an application under s. 66 of the Act, the question in respect of which leave is sought must have arisen before the High Court and its determination must have affected the event of the appeal or revision. I say "self evident" because of the language of that section which is cast as follows:

66 (1) When an appeal from a decision of a subordinate Court in a criminal matter has been determined by the High Court, the Court of Appeal may on the application of any party and shall on the application of the Public Prosecutor grant leave for the determination by itself of any question of law of public interest which has arisen in the course of the appeal and the determination of which by the High Court has affected the event of the appeal.

(2) An application for leave under this section shall be made within one month or such longer time as the Court of Appeal may permit of the determination of the appeal to which it relates and in the case of an application by the Public Prosecutor shall be made by or with the consent in writing of that officer only.

(3) When leave has been granted by the Court of Appeal under this section the High Court may make such orders as it may see fit for the arrest, custody or release on bail of any party to the appeal and the Registrar of the Court from which the appeal 1ies shall forward the record of the proceedings in the High Court to the Chief Registrar who shall thereupon appoint and notify to the parties to the appeal the time and place for the hearing of the matter.

(4) When leave has been granted by the Court of Appeal it shall hear and determine the question allowed to be referred for its determination and make such orders as the High Court might have made as it may consider just for the disposal of the appeal.

(5) For the purposes of this section but without prejudice to the generality of its provision:

(a) any question of law regarding which there is a conflict of juridicial authority shall be deemed to be a question of public interest; and

(b) the reservation of a question of law for the consideration of the High Court under any law relating to criminal procedure or the exercise by the High Court of any power of revision under any such law shall be deemed to be an appeal from a decision of a subordinate Court in a criminal matter.

As can be seen from the inclusionary provision in s. 66(5)(b), all references in ss. (1) to an appeal are to be treated as encompassing orders made in, to quote the words of the statute, "the exercise by the High Court of any power of revision". That brings me to to the heart of the matter before us. Does the refusal by a High Court to revise come within the phrase in the statute that I have quoted a moment ago?

Encik Su submits that once the Judge of the High Court called for the record of the Magistrate in the instant case there was an exercise of the revisionary power and his refusal to intervene does not make it any the less. Cik Junaidah, responding, submits that there was no proceeding before the High Court, that the question now posed did not surface at all before that Court and that in any event the language of the subsection now under consideration requires the positive exercise of the power of revision so that the section does not bite when the High Court declines to act in revision and to make any order.

Padfield v. Minister of Agriculture [1968] AC 997 and *Liaw Kwai Wah v. P.P.* [1987] 2 MLJ 69 were relied upon by Encik Su in support of his argument. *Padfield (supra)* is of no assistance since it concerned the grant of mandamus against the Minister who failed to act in accordance with an Act of Parliment and who gave no reasons for his refusal. *Liaw Kwai Wah (supra)* on the other hand is authority for two propositions. First, that there is a duty on the High Court to call for the record of a subordinate Court once a request in that behalf has been made. Second, that the power to revise sentences imposed by an inferior Court should be exercised sparingly.

It has been repeatedly emphasised by our Courts that only questions falling within s. 66(1) should be formulated for reference and that the section ought not to be used as an indirect method of appealing against an otherwise non-appealable order or decision. Thus in *Tan Yin Yen v. P.P.* [1973] 2 MLJ 143, Suffian Ag CJ, speaking on behalf of the Federal Court said:

> It is to be observed that questions of law which may be referred to us under s. 66 should not be questions that are of personal interest only to the accused or the Public Prosecutor, but should be questions that are of public interest, and it seems to us better if the High Court were to exercise their discretion under s. 66 sparingly, so that the references are not used as in indirect wav of appealling against matters that under the law have been finally determined by the High Court.

Again, in *Nunis v. P.P.* [1982] 2 MLJ 114 at page 118, Raja Azlan Shah CJ (Malaya), as he then was, said:

> For leave to be granted, it is necessary that the question posed is a question of law raised in the course of the appeal to the High Court and is of public interest. I have in delivering the judgment of this Court in *A. Ragunathan v. Pendakwa Raya* dealt with the test for

determining what amounts to a question meeting the requisite factors for the purposes of s. 66 of the Courts of Judicature Act, and I made it clear that if it is a mere question of principles, which in the matter before us only involved the construction of certain words in the statutory provision in their application to the facts of the case, the question would not be a question of law of public interest.

In the instant application we are of the view that the construction of the words in question in the statutory provision for which leave is sought under s. 66 of the Courts of Judicature Act would be a matter of applying the relevant statutory provision to the factual circumstances of any particular case. The learned Judge has infact dealt with the facts of this particular case and applying the statutory provision thereto came to the conclusion that he did. As I have said, these must of necessity vary from case to case according to the facts and we do not therefore think that the question raised before us is accordingly one of law of public interest.

Having given the matter careful consideration, I find that the answer to the problem posed lies in giving effect to the plain words of s. 66(1) and (5) of the Act. It is an established principle of statutory interpretation that in the absence of any ambiguity, and there is none in the instant case, a strict and literal construction should be applied to the language by which Parliament has expressed its collective intention: *Malayan Banking v. International Tin Council* [1989] 3 MLJ 286.

Applying the principles culled from the authorities to which I have adverted, the conclusion I am driven to is that the expression "the exercise of any power of revision" appearing in ss. (5)(b) of s. 66 of the Act encompasses not only the calling for the record of a case but also the making of an order. Were it the intention of the legislature to render a different or wider meaning it would have said so by simply adding the phrase "or a refusal to exercise" after the word "exercise" appearing in ss. (5)(b) of s. 66.

The power to act in revision conferred by Chapter XXXI of the Code must be read with the additional and somewhat wider power reflected in s. 35(1) of the Act. When read in its proper context, revision is the act of calling for the record of a subordinate Court and the making of one or more orders in respect thereof. Where the High Court calls for the record but having examined it decides to take the matter no further, there is no revision.

Put shortly, I agree with the submission of Cik Junaidah, the learned Deputy, that there must be a positive act of revision, being more than the mere act of calling for the records. I also agree with her submission that there were no proceedings before the High Court and that in any event the question sought to be posed to us did not arise in the High Court.

In the circumstances, the threshold requirements of s. 66(1) are absent and this Court has therefore no jurisdiction to entertain the application.

Before I conclude there is one other matter that I ought to have brought to the attention of Counsel during argument. It has to do with the citation of the Datuk Bandar as the respondent to the motion. The proper respondent to all criminal proceedings before the High Court and this Court is the Public Prosecutor and not the particular complainant in criminal proceedings commenced by the issue of a summons. This is for the reason that it is the Public Prosecutor who has the sole control over all criminal proceedings of whatever nature and by whomsoever commenced.

For the reasons given in this judgment this application fails and is hereby dismissed.

Hj. Shaik Daud JCA:

I have had the priviledge of reading in drafts both the judgments of my brothers Justice V.C. George and Justice Gopal Sri Ram. In my view there is a lacuna in the law on the refusal of a Judge to exercise his revisionary powers but I feel the Courts is not the place to fill in this lacuna.

I therefore concur with the judgment of my brother Justice Gopal Sri Ram.

V.C. George JCA:

Zaibar Auto (M) Sdn. Bhd. (the Corporation) was served with a summons issued by the Magistrate's Court charging it with the offence of trading in contravention of bye-law 2 of the Licensing of Trades, Businesses and Industries (Federal Territory of Kuala Lumpur) Bye-laws 1986, a bye-law of the Local Government Act 1976.

Mohd. Dalhar bin Redzwan, the general manager of the Corporation, attended at the Magistrate's Court at Kuala Lumpur on 28 September 1994, the return date of the summons and presumably on behalf of the Corporation pleaded guilty to the charge. A conviction was recorded and according to Mohd. Dalhar a fine was imposed on him of RM500, in default one months jail and RM100 for each subsequent day the Corporation continues to trade after 28 September 1994.

Some time after 28 September 1994 Mohd. Dalhar took legal advice as a result of which and on his instructions his solicitors on or about 14 October 1994, wrote to the relevant Judge of the High Court at Kuala Lumpur charged with the supervisory role over the Magistrates' Courts in Kuala Lumpur, inviting him to exercise his revisionary powers under s. 323 of the Criminal Procedure Code (CPC). A number of grounds held out to give support for intervention by the Judge were included in this letter.

The learned Judge invoked s. 323 and sent for and examined the record of proceedings of the Magistrates' Courts presumably in the light of the matters raised in the letter to him. However, in effect, he arrived at the conclusion that there was nothing in the complaints made that merited interference by him with what had transpired at the Magistrate's Court. That that was the position and that he did so is clear from the letter dated 20 October 1994 written by his Registrar to the solicitors in reply to their letter of 14 October 1994. Being dissatisfied with this, Mohd. Dalhar has joined the Corporation in this application invoking s. 66(l) of the Courts of Judicature Act (read with s. 66(5)(b) thereof) seeking the granting of leave of the Court of Appeal for the determination by itself of what is said to be a question or questions of law of public interest.

Having heard submissions of learned Counsel we reserved judgment. I now hand down my views and the decision I would make on the application.

Section 66 of the Courts of Judicature Act is as follows:

> 66. (1) When an appeal from a decision of a subordinate Court in a criminal matter has been determined by the High Court, the Court of Appeal may on the application of any party and shall on the application of the Public Prosecutor grant leave for the determination by itself of any question of law of public interest which has arisen in the course of the appeal and the determination of which by the High Court has affected the event of the appeal.
>
> (2) An application for leave under this section shall be made within one month or such longer time as the Court of Appeal may permit of the determination of the appeal to which it relates and in the case of an application by the Public Prosecutor shall be made by or with the consent in writing of that officer only.

(3) When leave has been granted by the Court of Appeal under this section the High Court may make such orders as it may see fit for the arrest, custody or release on bail of any party to the appeal and the Registrar of the Court from which the appeal lies shall forward the record of the proceedings in the High Court to the Chief Registrar who shall thereupon appoint and notify to the parties to the appeal the time and place for the hearing of the matter.

(4) When leave has been granted by the Court of Appeal it shall hear and determine the question allowed to be referred for its determination and make such order as the High Court might have made as it may consider just for the disposal of the appeal.

(5) For the purposes of this section but without prejudice to the generality of its provisions

(a) any question of law regarding which there is a conflict of judicial authority shall be deemed to be a question of public interest; and

(b) the reservation of a question of law for the consideration of the High Court under any law relating to criminal procedure or the exercise by the High Court of any power of revision under any such law shall be deemed to be an appeal from a decision of a subordinate Court in a criminal matter.

It is obvious that for s. 66 (1) of the Courts of Judicature Act (read with s. 66(5)(b) thereof) to be invoked *vis-a-vis* the exercise of the power of revision of the High Court under s. 323 of the CPC, there has to have been an exercise of some power of revision (the phrase used in the sub-sub-section is "any power of revision") and there has to have been a question or questions of law of public interest that arose in the course of the exercise of such power of revision, the determination of which by the High Court had affected the exercise of the revisionary powers.

An important question that has arisen in this application is whether the calling for and examining of the record of the proceedings by the Judge of the High Court and his giving due consideration to the matters raised by the solicitors *per se*, amount to an exercise by the Judge of a power of revision within the meaning of the second limb to s. 66(5)(b).

It is relevant and convenient to reproduce here the portions relevant to this judgment, of all the five sections of Chapter XXXI of the CPC.

Chapter XXXI
Of Revision

323. Power to call for records of inferior Courts.

(1) A Judge may call for and examine the record of any proceeding before any Criminal Court for the purpose of satisfying himself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of such inferior Court.

(2) ....

324. Power to order further inquiry.

(1) On examining any record under the last preceding section, or otherwise, a Judge may direct the Magistrate to make, and the Magistrate shall make, further inquiry into any complaint which has been dismissed under s. 135, or into the case of any accused person who has been discharged.

(2) ....

325. Powers of Judge on revision.

(1) A Judge may, in any case the record of the proceedings of which has been called for by himself or which otherwise comes to his knowledge, in his discretion, exercise any of the powers conferred by s. 311, 315, 316 and 317 of this Code.

(2) No order under this section shall be made to the prejudice of the accused unless he has had an opportunity of being heard, either personally or by advocate, in his own defence.

(3) Nothing in this section shall be deemed to authorise a Judge to convert a finding of acquittal into one of conviction.

326. Permission for parties to appear.

No party has any right to be heard, either personally or by advocate, before a Judge when exercising his powers of revision: provided that such Judge may, if he thinks fit, when exercising such powers hear any party, either personally or by advocate, and that nothing in this section shall be deemed to affect ss. (2) of the last preceding section.

327. Orders on revision.,

When a case is revised under this Chapter by a Judge he shall certify his decision or order to the Court by which the finding, sentence or order revised was recorded or passes stating, where such finding, sentence or order has been varied, the grounds for such variation; and the Court to which the decision or order is so certified shall thereupon make such orders as are conformable to the decision so certified and, if necessary, the record shall be amended in accordance therewith.

Section 323 is the first of the sections in Chapter XXX1 the CPC which, as has been seen, is entitled “Of Revision”. Section 323 provides powers to the Judge of the High Court the exercise of which powers is the calling for and examining the records of inferior Courts for the purposes set out in that section. Section 324 and s. 325 deal with the powers given to the Judge to be exercised after he has exercised the powers given to him by s. 323. This is brought home in respect of s. 324 by the provision that the power to order further inquiry is to be exercised "after examining any record ..." and by the heading to s. 325: "Powers of Judge on revision."

“On Revision”, in the context, in my judgment, has reference to the exercise by the Judge of the powers given to him by s. 323 and having done so, that is, having called in and examined the record of proceedings of the inferior Court, the directing of his mind as to whether he should or should not exercise the powers given to him by either s. 324 or s. 325.

In the instant case it is clear that he had exercised that part of the powers “of revision” given by s. 323 but he had declined “on revision” to exercise the powers under either s. 324 or s. 325. As he had exercised his powers under s. 323 which is an exercise “of revision”, such exercise is by the terms of s. 66(5)(b) of the Courts of Judicature Act (that refers to “any power of revision”), deemed to be an appeal from the decision of the subordinate Court in question and accordingly may properly be the subject of an application for granting of leave to have the matter taken up in the Court of Appeal provided that there is a question of law of public interest which had arisen in the course of the exercise of the powers of the Court under s. 323 the determination of which by the Judge had affected his decision not to exercise the powers alloted to him under ss. 324 or 325.

It has been suggested in the course of this application that s. 66 (1) may not be properly invoked in respect of the exercise of the powers given by s. 323 of the CPC unless the Judge concerned had gone on to exercise powers given to him by s. 324 and/or s. 325. The effect of this suggestion is that the party aggrieved by the Judge not interfering with the Magistrate's decision or order although invited to do so and even if there has been a blatant miscarriage of justice may not seek to take the matter further whereas the party on the other side may do so if the Judge had interfered. This lack of equality between the parties in respect of the consequences arising from the decision taken by the Judge is reminiscent of the problems that arose in respect of the important procedural distinction between what is a final and what is an interlocutory judgment or order. There used to be differences in the procedures for appealing from a final judgment or order and one that was interlocutory only both in England and here. Order 14 applications illustrate the problem. If the application is in favour of the plaintiff applicant, it can be said that there is a final judgment. And it can be said that the defendant may normally appeal against such a judgment without leave. However if the O. 14 is dismissed and consequently leave is given to the defendant to defend, it can be said that there has not been finality and that the order given is interlocutory in nature and that accordingly the plaintiff may not normally appeal without leave. Lord Esher MR in *Salaman v. Warner* [1891] 1 KB 734 CA got round this obvious inequality in respect of consequences of the same application by looking at the nature of the application and not at the nature of the order made thereon. The basis of the *Salaman* test is that a judgment or order must be interlocutory in character unless it is made on an application which must operate in such a way that, whatever judgment or order is given or made on it, it must finally dispose of the dispute or controversy between the parties. In effect even though an O. 14 judgment is obviously a final judgment in that it has finally disposed of the dispute between the parties it would be in the test applied by Lord Esher, deemed to be interlocutory. A fiction was resorted to in the interest of equality of steps to be taken post judgment or order, by the aggrieved party.

In *Bozson v. Altrincham* UDC [1903] 1 KB 546 @ 548 Lord Alverstone CJ in effect refused to apply the said fiction. The test he applied was to look at the order made and not at the nature of the application. If the order finally disposes of the rights of the parties it is final but if it does not, then it is interlocutory. In Malaysia the former Court of Appeal had in *Ratnam v. Cumarasamy* [1962] 28 MLJ 330, applied the *Bozson* test. In 1971, Lord Denning MR in *Salter Rex & Co. v. Ghosh* [1971] 2 QB 597 pointed out that although the *Bozson* test may be logical, "Lord Esher's test has always been applied in practise". He preferred and applied the *Salaman* test. In the case from Malaysia, *Haron bin Mohd. Zaid v. Central Securities (Holdings) Bhd.* [1983] 1 AC 16; [1982] MLJ 94, the Privy Council though unhappy that the *Bozson* test had been applied had declined to interfere but only, it would seem, because the Federal Court had been applying the *Bozson* test and because it was a question of procedure and because there was a tradition in England of the House of Lords not interfering with the decisions of their Court of Appeal in respect of matters of procedure.

The 1985 White Book in dealing with the distinction between interlocutory and final orders states at 59/1/15:

> In deciding whether an order is final or interlocutory the Court of Appeal applies the test in *Salter Rex & Co. v. Ghosh* [1971] 2 QB 597; [1971] 2 All ER 865, CA *(Steinway & Sons v. Broadhurst-Glegg*, The Times, 25 February 1983, CA; *White v. Brunton*, 12 March 1984

(unrep.), CA). To determine whether an order is final or interlocutory regard must be had to the nature of the application made in Court below .... (A different test was applied in *Bozson v. Altrincham* UDC [1903] 1 KB 547 (which was followed by the Privy Council in *Haron Bin Mohd Zaid v. Central Securities (Holdings) Bhd.* [1983] 1 AC 16; [1982] 2 All ER 481). The Court of Appeal is now firmly committed to the *Salter Rex* test and does not apply the test adopted in *Bozson* and *Haron Bin*; see *White v. Brunton*, above.)

Eventually, in England, resort had to be made to statute to ensure that the inequality of the *Bozson* test was brought to an end. Section 18(2)(a) of the Supreme Court Act 1981 gave statutory approbation to the Esher fiction and provided that "an order refusing unconditional leave to defend an action shall not be treated as an interlocutory order...".

In my respectful judgment, in respect of the parties to a matter that has been looked into by a Judge pursuant to his powers under s. 323 of the CPC there should be equality of consequences and particularly as s. 66(l) of the Courts of Judicature Act (read with s. 66(5)(b)) lends itself to be read with such equality of consequences, it should be so read.

Another compelling submission that can be made in favour of holding that the invocation of the Judge of s. 323 amounts to the exercise by the High Court of a power of revision even though he chooses not to interfere with the Magistrate's decision or order, is a reference to the terms of s. 326 of the CPC which for convenience and emphasis is reproduced again:

326. Permission for parties to appear.

No party has any right to be heard, either personally or by advocate, before a Judge when exercising his powers of revision: provided that such Judge may, if he thinks fit, when exercising such powers hear any party, either personally or by advocate, and that nothing in this section shall be deemed to affect ss. (2), of the last preceding section.

In my judgment the phrase in the section "when exercising his powers of revision" clearly has reference to the Judge deliberating on what order (if any) he should make as he, pursuant to the powers given to him by s. 323, examines the Magistrate's record of the proceedings and is not limited to his making the orders he is permitted to make either pursuant to s. 324 or s. 325.

What then has to be first considered by this Court is whether there had been any question of law of public interest which arose for the consideration of the Judge of the High Court in the exercise of the revisionary powers he had exercised pursuant to s. 323 that is when he examined the record of proceedings of the Magistrate's Court. And secondly, if there was such question, whether the determination of such question has affected the learned Judge's decision not to interfere with the course taken by the learned Magistrate.

In the affidavit in support of the application before us reference was made to three questions said to be such questions of law of public interest. They were as follows:

(i) That a party summoned has a right to appeal against the refusal of the High Court Judge to revise the case based on the facts set out in exhibit "A".

ii) Whether s. 10 of the Local Government Act 1976, or more specifically s. 102(s) is with regard to a trade, business or industry which is of an obnoxious nature of which could be a source of nuisance to the public or a class of the public.

iii) Whether selling used cars amount to a trade, business or industry which is of an obnoxious nature of which could be a source of nuisance to the public or a class of the public.

Before us Question (ii) and (iii) were not relied on and on it being pointed out that there is no nexus between the first question and s. 66, Counsel for the applicant said (and we

entertained his saying so) that the words in the first of the question "That a party summoned has a right to appeal" should be substituted so that the question would read as follows or to like effect (the substituted words are emphasised):

> **That a party who had applied to the High Court for revision has a right to apply to the Court of Appeal for leave to appeal** against the refusal of the High Court Judge to revise the case based on the facts set out in exhibit "A".

Exhibit "A" is the letter written to the learned Judge by Mohd. Dalhar's solicitors inviting him to exercise his revisionary powers. One of the matters raised in the said letter is that Mohd. Dalhar had pleaded guilty to the charge against the Corporation. The Court had accepted the plea and as has been seen, imposed a fine of RM500 in default one month. The letter states at the paragraph marked 2(iv) that on his making the plea "he" was convicted:

> Although Encik Mohd. Dalhar bin Redzwan is the General Manager of the accused Zaibar Motor (M) Sdn. Bhd., he was and is not a director, company secretary, shareholder or officer of Zaibar Motor (M) Sdn. Bhd. and should not have been convicted.

In *Justin Milroy Narakera v. P.P.* [1990] 2 CLJ 226 Shanker J (as he then was) pointed out at page 229 that there is a lacuna in the CPC as to how a Corporation is to plead to a criminal charge. He also pointed out that s. 5 of the CPC allows the application of English Law to fill the lacuna. Section 33 of the English Criminal Justice Act of 1925 provides for a company's representative to plead for the company. In the old Colony of Singapore CPC, s. 56 (there was no equipollent section in the Straits Settlements CPC, the FMS CPC or the Indian CPC) provided for a representative to plead for the corporation - ss. (4) of the said s. 56 is as follows:

> 56 (4) A representative for the purposes of this section need not be appointed under the seal of the corporation, and a statement in writing purporting to be signed by a Managing Director of the corporation, or by any person (by whatever name called) having, or being one of the persons having, the management of the affairs of the corporation, to the effect that the person named in the statement has been appointed as the representative of the corporation for the purposes of this section shall be admissible without further proof as *prima facie* evidence that that person has been appointed.

In the *Justin Milroy Narakera* case (*supra*) the corporation that Narakera represented in Court (in his capacity as its Managing Director) had been charged with being in arrears of EPF contributions. Section 16A(4) of the EPF Act provides that arrears ordered to be paid shall be recoverable in the same manner as a fine. Section 283(l)(b)(4) of the CPC allows the Court to order imprisonment in default of payment of the fine imposed. Although it was the corporation that was charged in that case, as Justice Shanker put it, the Magistrate's Court transposed Narakera into the shoes of the company as if he were its alter ego without his being charged for any offence and an order of imprisonment in default of the corporation paying up the arrears ordered to be paid was imposed on Narakera. Which is exactly what happened in the Magistrate's Court, in the instant case, to Mohd. Dalhar. Justice Shanker points out at page 231 that:

> This was done by resort to s. 18(2) of the EPF Act which reads as follows in material particular:
>
> > Where an offence under this Act ... has been committed by a body corporate... any person who at the time of the commission of the offence was a director ... of the body corporate... shall as well as such body corporate... be deemed to be guilty of that offence unless he proves that the offence was committed without his consent or connivance and that he exercised all such diligence to prevent the commission of the offence...

a It is the considered opinion of the Court that before resort can be had to this section the director of the corporation in question has to be formally charged and the ingredients of the section proved against him. The two ingredients required to make out a *prima facie* case are that the company has committed the offence and secondly that the director was a director at the time the offence was committed.

b By transposing Mr. Narakera into the shoes of the company, as if he were its alter ego, without any evidence whatsoever before him of the second ingredient the Magistrate did something which was totally impermissible in law. Had he been formally charged it would have been open to Mr. Narakera even if he had been a director at the time, to give evidence of due diligence. The learned Magistrate pre-empted this right. Furthermore the liablity to pay the arrears of contributions recoverable as a "fine" was the liability of the company. It does not automatically pass on to its directors under s. 18(2) of the Act. What fine a director must pay be assessed after he is convicted for the offence of which he is to be deemed guilty.
c That liability is to the fine *per se*. The liability to pay arrears of contributions which shall be recoverable as a fine is a liablity of the employer alone under s. 16A(4).

Consequently it follows that the order made by the learned Magistrate was a nullity and I hereby set it aside.

I gratefully and respectully accept the ratio of that judgment of Justice Shanker as set out
d hereabove as being a correct holding of what the law is. Applying that to the facts of the instant matter (and having in mind that the applicants have referred to the facts set out in letter "A") it is my judgment that clearly there were at least two questions of public interest which were before the Judge when he chose to invoke s. 323 and called for and examined the proceedings in the Magistrate's Court that that is to say (i) whether Mohd. Dalhar's plea of guilt should have been accepted and (ii) should he have been convicted and in any
e event should he have been fined as he claims to have been. The order that there be one month's imprisonment in default of payment of the fine could not have been directed to the company and must have been directed to Mohd. Dalhar and indeed suggests that it was Mohd. Dalhar who was fined (and perhaps was even convicted!). In my judgment there can be no doubt that the determination of each of those questions by the learned Judge must have been in the affirmative and must have effected the event of the learned Judge refusing
f to interfere with the learned Magistrate accepting the plea of guilt and making the orders that he had made.

One obvious question that arises here is why was there no appeal from the decision of the Magistrate. The short answer is that a person who pleads guilty may not appeal the conviction. He could have appealed against sentence and when the appeal came up perhaps taken up the issue of nullity but that, with respect, is a round about way of trying to rectify
g the error made. The revisionary powers provided by s. 323 are, it seems to me, designed for just the kind of situation that Mohd. Dalhar found himself to be in and is in my view the more appropriate procedure to be invoked where a person who is not charged is subjected to a penalty as appears to have happened in this case.

In my judgment the applicant Mohd. Dalhar is entitled to the leave he seeks. Speaking for
h myself, I would be inclined not to allow this matter to be prolonged any further. If we go by what Mohd. Dalhar states in his affidavit (and the respondent has not taken issue with what he states), the conviction and the orders made consequent thereto are clearly nullities. I pause to note that what transpired in this case both at the Magistrate's Court and after the matter was brought to the attention of the Judge dramatically demonstrates that it cannot but be that the Court of Appeal should allow itself to give due consideration to the refusal
i of the Judge to particularly interfere after he had called in and examines the records. An

order made in the criminal jurisdiction of the Magistrate's Court which is a nullity and unjust, to boot, should not be allowed to stand. That being so it seems to me that this Court should forthwith set aside the conviction and the sentence passed whether it was against Mohd. Dalhar or the Corporation and direct that the fine be refunded to Mohd. Dalhar with the further direction that the Magistrate fix a fresh date for the return of the summons when he could ensure that some person entitled to properly appear on behalf of the Corporation appears before the Court. I would end this judgment by referring to the suggestion made by Justice Shanker in *Justin Milroy Narakera* (*supra*) in respect of the approach to be taken in respect of the lacuna in the Code as to how a plea from a corporation charged with an offence be taken. I refer to the last sentence at page 229 of his judgment:

> So nothing turns on this except to suggest that in future cases and until the law is amended, a plea from a corporation should be taken in writing by the Company's representative and in the absence of the same, a plea of not guilty be entered and the trial proceeded therewith.

Having in mind the said s. 56(4) of the Colony CPC I would put the suggestion down as follows:

> Until the law is amended, a plea from a corporation in respect of a charge against it should be taken from a representative of the corporation duly authorised by a statement in writing to do so signed by the managing director of the corporation or by the person having the management of the affairs of the corporation and in the absence of the same, a plea of not guilty be entered and the trial proceeded with.